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Tan Gin Seng v Chua Kiam Hong

HIGH COURT (KUCHING) — SUIT NO 22-96-96-III/II
MUHAMMAD KAMIL J
23 MAY 1998

B ***Civil Procedure*** *— Contempt of court — Order of commital, application for — Affidavit accompanying notice of motion did not contain sufficient information as to alleged breach of injunction — Whether plaintiff has proved case beyond reasonable doubt*

Civil Procedure *— Contempt of court — Commital proceedings — Leave to issue — Application to set aside — Whether application for leave must be made to a judge — Rules*
C *of the High Court 1980 O 52 r 2(2)*

The plaintiff applied for an order of committal against the defendant for breach of an interim mandatory injunction whereby leave for such order was granted by the court on an ex parte application. The defendant in turn, applied for an order to set aside the ex parte order
D granted to the plaintiff. Counsel for the plaintiff submitted that as the application for leave was an ex parte application, the defendant could not challenge the validity of the leave granted by the court. To do so would have the effect of circumventing O 52 r 2 of the Rules of the High Court 1980 ('the RHC'). Counsel for the defendant submitted that the leave granted was wrong as it was contrary to the provisions
E of O 52 r 2(2) of the RHC.

Held, dismissing the plaintiff's application with costs:

(1) The ex parte application for leave by the plaintiff did not comply with provisions of O 52 r 2(2) of the RHC, which has the effect of
F nullifying the proceedings. It was wrong to say that the defendant was barred from challenging it. The word 'must' in O 52 r 2(2) is imperative or mandatory in nature (see pp 31I and 32A); *Chan Sang & Anor v Golded Century Development Sdn Bhd & Anor and other actions* [1995] 1 MLJ 92 followed.

G (2) There was no evidence in the affidavit of the plaintiff in support of the application for contempt that the defendant had breached the terms of the injunction. The plaintiff had thus failed to prove beyond reasonable doubt that there was such breach (see p 34F); *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239; *Capital Insurance Bhd v BS Sidhu*
H [1996] 3 MLJ 1; *McIlraith v Grady* [1968] 1 QB 468; *Gordon v Gordon* [1946] 1 All ER 247 and *Re Bramblevale Ltd* [1970] Ch 128 followed.

[Bahasa Malaysia summary

I Plaintif memohon satu perintah komital terhadap defendan atas kemungkiran injunksi mandatori interim di mana kebenaran untuk perintah demikian diberikan oleh mahkamah atas suatu permohonan

ex parte. Defendan pula memohon perintah untuk mengetepikan perintah ex parte yang diberikan kepada plaintif. Peguam plaintif menghujahkan bahawa oleh kerana permohonan untuk kebenaran adalah suatu permohonan ex parte, defendan tidak boleh mencabar kesahan kebenaran yang diberikan oleh mahkamah. Untuk berbuat demikian akan memberi kesan memintasi A 52 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Peguam defendan berhujah bahawa kebenaran yang diberikan adalah salah kerana ia bertentangan dengan peruntukan A 52 k 2(2) KMT.

Diputuskan, menolak permohonan plaintif dengan kos:

(1) Permohonan ex parte untuk kebenaran oleh plaintif tidak mematuhi peruntukan A 52 k 2(2) KMT, yang mempunyai kesan membatalkan prosiding tersebut. Adalah salah untuk mengatakan defendan dihalang daripada mencabarnya. Perkataan 'must' dalam A 52 k 2(2) adalah bersifat imperatif atau mandatori (lihat ms 31I dan 32A); *Chan Sang & Anor v Golded Century Development Sdn Bhd & Anor and other actions* [1995] 1 MLJ 92 diikut.

(2) Tiada keterangan dalam afidavit plaintif yang menyokong permohonan untuk penghinaan bahawa defendan telah melanggar syarat-syarat injunksi. Maka plaintif telah gagal membuktikan melampaui keraguan munasabah bahawa terdapat kemungkiran demikian (lihat ms 34F); *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239; *Capital Insurance Bhd v BS Sidhu* [1996] 3 MLJ 1; *McIlraith v Grady* [1968] 1 QB 468; *Gordon v Gordon* [1946] 1 All ER 247 dan *Re Bramblevale Ltd* [1970] Ch 128 diikut.]

Notes

For cases on application for order of committal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1133–1139.

Cases referred to

Bramblevale Ltd, Re [1970] Ch 128 (folld)
Capital Insurance Bhd v BS Sidhu [1996] 3 MLJ 1 (folld)
Chan Sang & Anor v Golden Century Development Sdn Bhd & Anor and other actions [1995] 1 MLJ 92 (folld)
Gordon v Gordon [1946] 1 All ER 247 (folld)
McIlraith v Grady [1968] 1 QB 468 (folld)
Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor [1988] 2 MLJ 239 (folld)
TO Thomas v Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151 (refd)
Tay Seng Keng v Tay Ek Seng Co Sdn Bhd [1978] 1 MLJ 126 (refd)
Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1995] 3 MLJ 549 (refd)

Legislation referred to

Rules of the High Court 1980 O 52 rr 2(1), (2), 3

Shankar (*Yong & Co*) for the plaintiff.
KC Wong (*KC Wong & Associates*) for the defendant.

Cur Adv Vult

Muhammad Kamil J: There are two applications this morning which will be dealt with together as they relate to the same subject matter. The first is the plaintiff's notice of motion dated 23 January 1998 (encl 130) for an order of committal against the defendant for breach of an interim mandatory injunction granted by the court on 26 September 1997. Leave for an order of committal was granted by the court on 22 January 1998 on an ex parte application. The injunction states, inter alia, that 'the defendant whether by himself or by his agents/servants or otherwise howsoever be restrained from doing the following acts or any of them that is to say; earth filling [or] damming the drain that serves the plaintiff's land, namely lot 1540 section 64 KTLD or otherwise diverting the water so as to cause the plaintiff's land to be flooded until the trial of this action'.

The second application is the defendant's summons in chambers dated 25 March 1998 (encl 135) seeking for an order that the ex parte order dated 22 January 1998 granted to the plaintiff be set aside.

I will deal first with the second application by the defendant to set aside the ex parte order of 22 January 1998.

Learned counsel for the plaintiff submitted that as the application for leave was an ex parte application, the defendant could not challenge the validity of the leave granted by the court; and to do so would have the effect of circumventing O 52 r 2 of the Rules of the High Court 1980 ('the RHC').

Learned counsel for the defendant submitted that leave by ex parte summons in chambers dated 22 January 1998 was wrong as it was contrary to the provisions of O 52 r 2(2) of the RHC which reads as follows:

> An application for such leave must be made ex parte to the court except in vacation when it may be made to a Judge in Chambers.

That Thursday, 22 January 1998 was not a court vacation, and therefore the application should have been made to the court, ie open court. In support, he cited the case of *Chan Sang & Anor v Golded Century Development Sdn Bhd & Anor and other actions* [1995] 1 MLJ 92 where the court held that 'leave under O 52 r 2(1) must be made to a judge of the High Court and not in chambers ... the application for leave is the root of the committal proceedings and any non-compliance of the procedure prescribed cannot merely amount to an irregularity but it would actually nullify the proceedings'.

In the instant case, the ex parte application for leave by the plaintiff did not comply with provisions of O 52 r 2(2), which has the effect of nullifying the proceedings. It is wrong to say that the defendant is barrred from challenging it. The word 'must' in of O 52 r 2(2) of the RHC is imperative

or mandatory in nature. As this application relates to restriction of the liberty of a person, and the nature of the proceedings is of a criminal or quasi-criminal nature, therefore, strict compliance to the rules is called for (see *Chan Sang*'s case). It nullifies the proceedings. In the circumtances, the ex parte order dated 22 January 1998 is a nullity and is set aside. Costs to the defendant to be taxed unless agreed.

Assuming that the ex parte order of 22 January 1998 is good, the plaintiff has to comply strictly with O 52 r 3 of the RHC which stipulates that:

> (1) When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion to the Court and, unless the Court or Judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.
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> (2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.
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> (3) Subject to paragraph (4), the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2, must be served personally on the person sought to be committed.
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> (4) Without prejudice to the powers of the Court or Judge under Order 62 rule 5, the Court or Judge may dispense with service of the notice of motion under this rule if it or he thinks it just to do so.

In *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239, Edgar Joseph Jr J (as he then was) said at p 242:

> Now, it is well-settled law that contempt of court is an offence of a criminal character since the liberty of the alleged contemnor is at stake. That being so, it is fundamental that a man ought not to be penalized unless he has both a fair opportunity to comply with the law and the capacity to do so. Any other approach would not only be morally objectionable but also should have no place in a legal system based on ideas of fair play and justice.

In *Capital Insurance Bhd v BS Sidhu* [1996] 3 MLJ 1, the Court of Appeal held that:

(1) Although the plaintiff's counsel was present and heard, the order directing him to refund the money deposited, nonetheless he was required by O 45 r 7 of the RHC to be served with the order personally before he could be said to have wilfully disobeyed the order, following *Gordon v Gordon*.

(2) Before contempt proceedings, which affects the liberty of a subject, can be enforced, there must be strict compliance with the rules that require the order of the court be served on the plaintiff's counsel. That court made no distinction that he was then the counsel and was present to hear the order. If he had been served with a sealed copy of the order according to the rules and had disobeyed, then the court could say in law that it was contempt. Since he had paid after service of the order, he had not committed contempt.

A In *McIlraith v Grady* [1968] 1 QB 468 at p 477, Lord Denning MR said:

> That second appeal is as to the committal order. Here we must remember the fundamental principle that no man's liberty is to be taken away unless every requirement of the law has been strictly complied with: see *Gordon v Gordon*
B [1946] 1 All ER 247, by Lord Greene MR.

In *Gordon v Gordon* [1946] 1 All ER 247, the appellant was the husband of the respondent in a case of the custody of a child. The tussle between them resulted in the custody of the child to the marriage in favour of the respondent wife with reasonable access to the appellant. While this was
C current and the child was with the appellant husband, he applied to rescind the custody order, and on 19 December 1945, the appellant husband, having acted in defiance, was ordered to hand over the child to the respondent by or before 7pm on 21 December 1945, but there was a delay and copy of the order, however, came to be served on the appellant only at 8pm. It was contended by the appellant in a summons for non-compliance
D that the order made on 21 December 1945 was bad on the ground that it was served after the time for compliance has expired. It was contended by the respondent that there was no necessity for the service of the order because:

(a) the appellant was evading service; and

E (b) the court had inherent jurisdiction to commit a person for contempt.

It was held:

(i) since orders for committal and attachment affected the liberty of the subject, proceedings for contempt by disobedience of an order to do
F something outside the court could only be enforced if the rules relating to the process of committal or attachment had been strictly complied with; and

(ii) on the facts, the service of the order in due time was necessary for the purpose of founding proceedings in contempt, the court having no power to dispense with the formal requirement of the rules.

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Lord Greene in the case said:

> Attachment and committal are very technical matters, and as orders for committal or attachment affect the liberty of the subject, such rules as exist in relation to them must be strictly obeyed. However, disobedient the party against whom the order is directed may be, unless the process of committal
H and attachment has been carried out strictly in accordance with the rules he is entitled to his freedom (at p 250F).
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> It becomes more manifestly unfortunate — I will not say absurd — when one finds that strict compliance with the rules as to service is required even in a case where the person against whom the order is made is perfectly well aware of, it is perhaps in court when it is made, and deliberately sets himself to flout
I it (at p 251G).

> In the result this undoubtedly contumacious person succeeds in retaining his liberty, he is entitled to do, owing to the fact that the order was not properly served (at p 253G).

In *Re Bramblevale Ltd* [1970] Ch 128, the Court of Appeal held that where a person was charged with contempt of court, which is an offence of a criminal nature involving the liberty of the subject, his guilt must be proved beyond reasonable doubt. Lord Denning MR said at p 137:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time- honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence. Take this very case. Mr Hamilton told a lie when he said that the books were damaged and lost in the car accident on 25 October 1967. That lie does not prove that Mr Hamilton kept those books for a further year and still had them in his possession from 28 November to 5 December 1968. He may have told the lie for another purpose — to conceal the fact that he destroyed the books himself shortly before the car accident. This would be a criminal offence, but not the one with which he is charged.
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> ... Where there are two equally consistent possibilities open to the court, it is not right to hold the offence is proved beyond reasonable doubt.

See *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151 (FC); *Tay Seng Keng v Tay Ek Seng Co Sdn Bhd* [1978] 1 MLJ 126 (FC) and *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1995] 3 MLJ 549 (SC).

By applying the principles stated in the cases mentioned to the instant case, the plaintiff has failed to prove that the defendant had committed a breach of the injunction. There is no evidence in the affidavit of the plaintiff in support of the application for contempt that the defendant had breached the terms of the injunction. The plaintiff has thus failed to prove beyond reasonable doubt that there was such a breach.

In the circumstances, the application for contempt cannot succeed, and I would dismiss the application with costs to the defendant to be taxed and paid forthwith unless agreed.

Application dismissed.

Reported by Mohd Rizal Abidin